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No. 03-257

IN THE
# Supreme Court of the United States

FIDELITY EXPLORATION AND PRODUCTION COMPANY,

*Petitioner*,

*v.*

NORTHERN PLAINS RESOURCE COUNCIL, INC.,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## BRIEF OF *AMICUS CURIAE* NORTHERN CHEYENNE TRIBE IN SUPPORT OF RESPONDENT

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## INTERESTS OF THE *AMICUS CURIAE*

This brief is filed by *amicus curiae* Northern Cheyenne Tribe (the "Tribe") in opposition to the Petition for Certiorari filed by Fidelity Exploration and Production Company ("Fidelity"). The Tribe participated as *amicus curiae* below, and files this brief pursuant to Supreme Court Rule 37.2(a)[1]. The Tribe has a direct interest in the case because Fidelity and other natural gas producers operating upstream of the Northern Cheyenne Reservation discharge waste water associated with coal bed methane production into the Tongue River, the mid-channel of which forms the eastern boundary of the Reservation.[2] *Id.* The Tribe holds reserved water rights to the Tongue River which were recognized in a Tribal-State compact ratified by Congress on September 30, 1992. Pub. L. 102-374, 106 Stat. 1186. Tribal members, as well as many off-Reservation farmers and ranchers, depend on the Tongue River to irrigate their farms and pastures.

This case concerns whether natural gas producers may discharge salty waste water generated in association with the production of natural gas from coal beds (coal bed methane or "CBM") into the Tongue River of southeastern Montana without a National Pollutant Discharge Elimination System ("NPDES") permit issued by the State of Montana under the federal Clean Water Act. The answer to this question does not turn on the outcome of *South Florida Water Management District v.*

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1. The parties have consented to the filing of this brief. Their letters of consent are on file with the Clerk of the Court. This brief has been authored in its entirety by undersigned counsel for the *amicus* curiae. No person or entity, other than the named *amicus* and their counsel, made any monetary contribution to the preparation and submission of this brief.

2. The Northern Cheyenne Tribe has approximately 8,000 members and occupies a Reservation comprising approximately 445,000 acres of land in southeastern Montana. About 90 percent of the Reservation's population is Northern Cheyenne and all but one percent of the land is held in trust by the United States for the Tribe and its members.

*Miccosukee Tribe of Indians*, No. 02-626, a case the Court will hear in its October 2003 term. Rather, it turns on whether CBM waste water falls under the plain language of the Clean Water Act's definition of the term "pollutant." 33 U.S.C. § 1362(6). The Ninth Circuit held that Fidelity's discharge falls under the Act's definition because (1) it is an "industrial waste," and (2) it is "produced water" *i.e.* "water derived in association with the production of . . . gas" which the Act treats as a "pollutant" unless it is disposed of in a State-approved well in the manner specified by 33 U.S.C. § 1362(6)(B). App 9a-11a. These narrow rulings affect only one component of the natural gas industry, are consistent with the language and legislative history of the Clean Water Act, follow the holdings of other circuits addressing the disposal of produced water, and accord with current agency and industry practice. Notwithstanding the grant of certiorari in *Miccosukee*, the Court should deny Fidelity's petition here.

## STATUTORY PROVISIONS INVOLVED

The Clean Water Act was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. Under the Act, the "discharge of any pollutant" from a "point source" into the waters of the United States is unlawful, unless the discharge is made in accordance with an NPDES permit issued by either the United States Environmental Protection Agency ("EPA") or a state or tribal agency authorized by EPA to administer the NPDES permit program. 33 U.S.C. §§ 1311(a), 1342. NPDES permits must contain conditions that ensure that discharges fall within technology-based effluent limitations, which in turn must be sufficiently stringent to provide for compliance with state or tribal water quality standards.[3] 33 U.S.C. §§ 1311(b)(1)(C), 1342(a)(1)(A).

3. The EPA is authorized to treat Indian tribes as States for various purposes of the Act, including the promulgation of water quality standards and the issuance of NPDES permits. 33 U.S.C. § 1377(e). The Tribe has applied for treatment as a state for the purpose of implementing the Act's water quality standards program.

The sole issue in this case is whether CBM waste water discharged into the Tongue River is a "pollutant" as that term is defined in the Act, 33 U.S.C. § 1362(6). App. 7a. Fidelity's Petition for Certiorari fails to include the Act's entire definition of "pollutant," omitting a crucial clause which pertains to "water derived in association with oil or gas production." 33 U.S.C. § 1362(6)(B). The full definition of "pollutant," including the omitted language reads:

> The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and *industrial*, municipal, and agricultural *waste discharged into water*. This term does *not mean* (A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 1322 of this title, or (B) water, gas, or other material which is injected into a well to facilitate production of oil and gas, or *water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in degradation of ground or surface water resources.*

33 U.S.C. § 1362(6) (emphasis added). The Ninth Circuit held that Fidelity's waste water falls within this definition because it is "industrial . . . waste discharged into water" and because it is "water derived in association with . . . gas production" that is not disposed of in accordance with the subsection B exception (*i.e.* via State-approved injection wells).

## STATEMENT OF THE CASE

### A. The Threat to Water Quality Posed by the Coal Bed Methane Industry.

Fidelity extracts natural gas from coal seams underlying the Tongue River valley of southeastern Montana from a well field upstream of the Northern Cheyenne Reservation. To produce CBM in this region, the coal seam aquifer must be partially dewatered, a process that produces 13,000 to 17,000 gallons of waste water daily per well. App. 3a.

The waste water produced by Fidelity's natural gas wells is "salty." It is about three times more saline that the ambient waters of the Tongue River and has a Sodium Absorption Ratio (SAR), a measure of the ratio of sodium to calcium and magnesium in the water, which is 40 to 60 times higher than river water. App. 4a. Use of high SAR water for irrigation causes long-term damage to soils, especially the clayey soils which predominate in the Tongue River valley. *Id.*

Currently there are about 250 producing CBM wells in Montana. However, the coal beds underlying the Tongue River valley have been targeted by Fidelity and other natural gas producers for larger-scale production. A Final Environmental Impact Statement recently released by the United States Bureau of Land Management and the State of Montana forecasts up to 14,000 producing CBM wells in Montana portion of the Tongue River watershed over the next 20 years. Montana Statewide Final Oil and Gas Environmental Impact Statement (January 2003) ("FEIS") at 4-5, *available at* www.mt.blm.gov/mcfo/cbm/eis. Tens of thousands of additional wells are projected in the upstream Wyoming portion of the watershed. *Id.* at 4-9. The FEIS warns that with this level of development, unregulated discharge of produced water could lead to "severe" degradation of water quality that would "limit the uses of affected waters" on the Northern Cheyenne Reservation. *Id.* at 4-72.

**B. Proceedings Below.**

This case began when the Northern Plains Resource Council (NPRC) brought a citizen enforcement action against Fidelity under the Clean Water Act alleging that Fidelity was discharging waste water from its CBM wells without an NPDES permit. In the district court, the parties stipulated that Fidelity was engaged in a discharge of waste water from a point source to a navigable water without a permit. The only issue before the court was whether Fidelity's waste water is a "pollutant." In an oral ruling granting Fidelity's motion for summary judgment, the district court held that Fidelity's waste water is not a pollutant requiring an NPDES permit. App. 7a. The district court never issued a written opinion.

NPRC appealed to the Ninth Circuit Court of Appeals. The Tribe as well as several irrigation districts and associations supported NPRC's appeal as *amici curiae*. App. 7a n.3. On April 10, 2003, the Ninth Circuit issued an opinion reversing the district court. App. 1a-18a. The Ninth Circuit held that the "plain language" of the Clean Water Act requires the conclusion that CBM waste water is a "pollutant" subject to regulation under the Act. App. 9a.

First, the Court held that Fidelity's waste water is "industrial waste," a term specifically included in the Act's definition of "pollutant." App. 9a. The Court reasoned that "[b]ecause Fidelity is engaged in production of methane gas for commercial sale and because CBM water is an unwanted byproduct of the extraction process, CBM water falls squarely with the ordinary meaning of 'industrial waste.'" *Id.* at 10a.

Second, the Court held that CBM waste water is a "pollutant" because it is "'produced water' derived from gas extraction." App. 10a (citing *Sierra Club v. Cedar Point Oil*, 73 F.3d 546, 568 (5th Cir.), *cert. denied*, 519 U.S. 811 (1996)). The Court reasoned that CBM waste water falls into the EPA's definition of the term "produced water" and that the Act

"only exempts water derived from gas extraction from regulation when the water is disposed of in a well and will not result in the degradation of other water bodies." *Id.* at 11a (citing 33 U.S.C. § 1362(6)(B)). Because Fidelity discharges its waste water "directly into the Tongue, not by reinjection into a state-approved well," its waste water "does not meet § 1362(6) exemption criteria," and is "a pollutant within the plain meaning of the [Clean Water Act]." *Id.*

The Court explained that its conclusion is supported by the Act's definition of "pollution" which is the "man-made or man induced alteration of the chemical, physical, biological and radiological integrity of water." App 11a (citing 33 U.S.C. § 1362(19)). The Court reasoned that by discharging CBM water into the Tongue River, Fidelity "alters the water quality of the Tongue River." *Id.* A holding that "the massive pumping of salty, industrial waste water into protected waters does not involve the discharge of a 'pollutant,'" the Court found, would "undermine the integrity of [the CWA's] prohibitions." *Id.* at 12a.

## REASONS FOR DENYING THE PETITION

1. The plain language of the Clean Water Act supports the Ninth Circuit's decision that CBM waste water falls under the Act's definition of "pollutant." Fidelity's discharge is not only an "industrial waste," it also is "produced water," *i.e.* "water derived in association with the production of . . . gas." 33 U.S.C. § 1362(6). Fidelity discharges its waste water directly into the Tongue River, not via injection into a State-approved well in accordance with the "produced water" exemption provided for in 33 U.S.C. § 1362(6)(B). There is no circuit split on the issue of whether "water derived in association with . . . gas production" is a "pollutant" under the Clean Water Act when it is discharged directly into the surface waters of the United States. To the contrary, the only other circuit court decision to address this issue, *Sierra Club v. Cedar Point Oil*, 73 F.3d 546 (5th Cir.), reached the same conclusion as the Ninth Circuit here, and this Court denied certiorari. 519 U.S. 811 (1996).

2. This case is distinguishable from *Miccosukee* and similar cases addressing whether dams and other surface water management activities "add" pollutants to navigable waters. In the case at bar, the waste water at issue originates from deep below the surface of the earth (outside the "waters of the United States") and is the byproduct of an industrial process – the production of natural gas from coal seams. Even if this Court reverses the Eleventh Circuit's ruling in *Miccosukee*, it would not affect the Ninth Circuit's ruling that Fidelity's CBM discharge falls within the plain language of the Clean Water Act's definition of "pollutant" because it is both "industrial waste" and "produced water."

3. The EPA has long required NPDES permits for the disposal of CBM waste water on lands within its jurisdiction, as have major CBM producing states such as Colorado and Wyoming. Fidelity has already obtained NPDES permits from the State of Montana for all of the discharges at issue in this case. The lack of any practical or immediate controversy over the application of the NPDES permit requirement to the discharge of CBM waste water counsels against a grant of certiorari which would upset the *status quo* and create regulatory uncertainty at a time when CBM production is burgeoning throughout the Rocky Mountain west.

## I. WATER DISCHARGED AS A RESULT OF NATURAL GAS PRODUCTION IS A "POLLUTANT" UNDER THE PLAIN LANGUAGE OF THE CLEAN WATER ACT.

### A. Fidelity's Discharge is "Industrial Waste."

The first basis for the Ninth Circuit's ruling that Fidelity's discharge is a "pollutant" under the Clean Water Act was that it fits within the broad category "industrial waste." App. 9a. Applying the ordinary meanings of the terms "industrial" and "waste," the Court of Appeals concluded that an industrial waste is "any useless byproduct derived from the commercial production of goods and services." App. 10a. Because Fidelity

is engaged in the commercial production of natural gas and because its waste water is an "unwanted byproduct of the extraction process," Fidelity's waste water "falls squarely within the ordinary meaning of 'industrial waste.'" *Id.*

The Ninth Circuit's ruling not only accords with the plain meaning of "industrial waste," it also accords with the legislative history of the Act's definition of the term "pollutant." This history demonstrates that Congress intended to adopt a definition of "pollutant" that would be "at least as broad" as that found in the Refuse Act of 1899, 33 U.S.C. § 407, which prohibits the discharge of "any refuse matter of any kind or description whatever" into any navigable water. *See United States v. Hamel*, 551 F.2d 107, 110-11 (6th Cir 1977), citing S. Rep. No. 92-414 at 76, *reprinted in*, *A Legislative History of the Water Pollution Control Act Amendments of 1972* 2:1494 (Envtl. Pol. Div., Cong. Research Serv. 1973) (hereafter "1972 Leg. Hist."); *see also*, 2 W.H. Rodgers, *Environmental Law: Air and Water*, § 4.9, at 144 (Congress "meant to carry on the tradition of the Refuse Act and that tradition was to construe the word 'refuse' as condemning each and every variation of damage-inducing wastes that changing technologies could invent."). Thus, while the definition of "pollutant" includes some very specific items such as "cellar dirt," it also broadly lists "industrial, municipal and agricultural wastes," thereby sanctioning "the inclusion of discharged substances that are not specifically listed into these broad categories." *Cedar Point Oil*, 73 F.3d at 565; *see also National Wildlife Fed'n v. Gorsuch*, 693 F.3d 156, 174 n.56 (D.C. Cir. 1982); *Hamel*, 551 F.2d at 110-111.

Fidelity claims that its discharge does not constitute a "pollutant" because it does not physically introduce pollutants from the "outside world" into the waters of the United States. Petition for Certiorari at 22-23 (citing *National Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 584, 586 (6th Cir. 1988) and *Gorsuch*, 693 F.2d at 174-75). The force of Fidelity's

argument, however, depends on how one defines the "outside world." From the perspective of the Clean Water Act, the "outside world" is any place outside "navigable waters" or the "waters of the United States." *See* 33 U.S.C. § 1362(12) ("discharge of a pollutant" means the "addition of any pollutant to *navigable waters* from *any* point source" [emphasis added]); *id.* § 1362(7) ("navigable waters" means the "waters of the United States"). The "waters of the United States" do not include ground waters. *See* 40 C.F.R. § 122.2; *Village of Oconomowoc v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir.), *cert. denied*, 513 U.S. 930 (1994). Because Fidelity extracts "salty" groundwater from deep below the earth, water that would otherwise "never reach the Tongue River were it not for Fidelity's extraction process," App. 3a, and discharges it as a waste product to the river, it *does* add pollutants from the "outside world" to the "waters of the United States."

Fidelity also argues that the Ninth Circuit's analysis was faulty because CBM waste water "can be and is used for" various beneficial purposes including domestic use, stock watering and wildlife. Petition for Certiorari at 18 n.7. But the mere fact that CBM waste water has many *potential* beneficial uses cannot alter the fact that Fidelity discharges water to the Tongue River as an unwanted by-product which, if unregulated, will degrade the natural and economic value of the river's waters. No doubt, beneficial uses can be found for many of the other substances listed in the Act's definition of "pollutant." *See* 33 U.S.C. § 1362(6) (listing "rock" and "sand" as pollutants). But under the Clean Water Act, like the earlier Refuse Act, such substances, no matter how useful in certain applications, become "pollutants" once they are discharged as unwanted by-products into the Nation's waterways. *See United States v. Standard Oil Co.*, 384 U.S. 224, 226 (1966) (rejecting contention that the phrase "refuse matter" in the Refuse Act excluded valuable substances and holding gasoline to be a "pollutant" under that statute); 2 Rodgers, *supra*, § 4.9, at 144 (under Clean Water Act a "pollutant" can be viewed as a "resource out of place").

In essence, Fidelity argues that "unaltered groundwater" can *never* be an "industrial waste" or a "pollutant" under the Clean Water Act. *See* Petition for Certiorari at 18. But as the Ninth Circuit reasoned, such a *per se* rule would "upset the integrity" of the Act. App. 14a. The fact that groundwater is "natural" or "unaltered" does not necessarily mean that it is benign.[4] Indeed, the record shows that CBM waste water is "salty" and contains high levels of SAR which can render surface waters unusable for irrigation. App. 4a. There is no "compelling reason" why this Court should grant a writ of certiorari to review the Ninth Circuit's fact-bound ruling that the unwanted, "salty" water that is discharged into the Tongue River as a result of Fidelity's CBM extraction process is an "industrial waste" and therefore a "pollutant" under the Clean Water Act.

### B. Water Derived in Association with the Production of Natural Gas is a "Pollutant" under the Clean Water Act.

The Act's broad definition of "pollutant," which encompasses all "industrial, municipal and agricultural waste discharged into water," is subject to a narrowly drawn exception for "water derived in association with oil or gas production" when the water is "disposed of in a well" which has been

4. Many industries discharge "unaltered groundwater" that may be hazardous to public health and the environment. For example, mining operations often result in discharges of "natural" but nevertheless toxic groundwater. *See, e.g., Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 473-75 (9th Cir. 2000) (groundwater filling mine pit and discharged to adjacent surface waters could exceed State water quality standards); *Montana Envt'l Info. Center v. Montana Dep't of Envtl. Quality*, 296 Mont. 207, 988 P.2d 1236, 1239 (1999) (mining company's discharge of groundwater containing naturally high levels of arsenic). Similarly, naturally occurring groundwater extracted for geothermal energy development can pose environmental hazards. *See, e.g., State Water Resources Department v. City of Klamath Falls*, 68 Or. App. 148, 682 P.2d 779, 784 & n.5 (1984) (State pollution discharge permit required for disposal of geothermal fluids derived from wells).

approved by a state based on a determination that underground disposal will not degrade ground or surface waters. 33 U.S.C. § 1362(6)(B). The Ninth Circuit held that Fidelity's discharge is a "pollutant" because it is "produced water," *i.e.* "water derived in association with . . . gas production," that is *not* disposed of in accordance with the terms of this exemption. App. 10a-11a.

The Ninth Circuit's holding is consistent with the Congressional intent. Congress's use of the broad term "industrial waste" in defining pollutant coupled with its crafting of a very narrow, conditional exception for "water derived in association with oil or gas production" is an indication that it intended that such produced water would be treated as a "pollutant" if it is not disposed of in accordance with the conditions specified in 33 U.S.C. § 1362(6)(B). *TRW Inc. v. Andrews*, 534 U.S. 19, 28-29 (2001) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent"); *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980). Congress would not have created this very narrow, conditional exception, if it intended that all water produced as a byproduct of gas production would be exempt from the Act.

In *Cedar Point Oil*, 73 F.3d at 567-69, the Fifth Circuit held that waste water derived in association with oil and gas production was a "pollutant" when discharged into the waters of Galveston Bay. The court reasoned that the Act's conditional exception for "water derived in association with oil or gas production" from the meaning of "pollutant" was a "strong indicator of Congress's concern over the effects of produced water on the environment." *Id.* at 568. The court further reasoned:

> [I]f Congress felt that it was necessary to draft a detailed exemption for produced water that has been disposed of in a state-approved reinjection well, it may be that Congress believed that such produced water would otherwise be a pollutant. If, absent an

> exemption, produced water reinjected into a state-approved well *is* a pollutant, then it is hardly a stretch to say that produced water deposited directly into a bay is also a pollutant.

*Id.* (emphasis in original). The Court emphasized that because Congress provided a "clear avenue" for oil or gas producers to avoid regulation by the Clean Water Act, a producer that "chose not to avail itself" of that avenue should be subject to the Act. *Id.* at 568 n.36.

Fidelity attempts to distinguish *Cedar Point Oil* on the basis that the "produced water" at issue in that case apparently included materials added to water in the oil and gas production process.[5] Petition for Certiorari at 18-19. However, as the Ninth Circuit's opinion points out, EPA defines "produced water" to mean "water (brine) brought up from the hyrdocarbon-bearing strata during the extraction of oil and gas," a definition which "does not turn on the addition of chemicals or any other alteration." App. 10a (quoting 40 C.F.R. 435.41(bb)).[6] Furthermore, the Act's definition of "pollutant" does not use the term "produced water," but instead uses the more inclusive term "water derived in association with oil or gas production." 33 U.S.C. § 1362(6)(B). In this case, there can be no dispute that the waste water discharged by Fidelity into the Tongue River is "derived in association with . . . gas production ," and is *not*

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5. In some cases, produced water contains residual quantities of crude oil, a "natural" constituent of groundwater found in association with crude oil deposits. *See BP Exploration & Oil v. United States Envtl. Protection Agency*, 66 F.3d 784, 792 (6th Cir. 1995). Fidelity position would mean that "unaltered groundwater" containing naturally occurring crude oil residues could not be treated as a pollutant when brought to the surface in an oil well.

6. Fidelity points out that this definition of "produced water" applies only to offshore and coastal oil and gas operations. Petition for Certiorari at 20 n.9. Nevertheless, the regulations applicable to *onshore* oil and gas operations specifically list "produced water" as a "waste water pollutant." 40 C.F.R. § 435.32.

"disposed of in a well" approved by the State of Montana. Petition for Certiorari at 2-3. Accordingly, the Ninth Circuit logically concluded that Fidelity's waste water is a "pollutant" under the plain language of the Clean Water Act, 33 U.S.C. § 1362(6)(B).

The legislative history of the Clean Water Act strongly supports the Ninth Circuit's conclusion. The Senate Committee Report for the legislation that became the Clean Water Act indicates that the Senate intended to create only "two *specific* exceptions from the term pollutant: sewage from vessels, as that term is defined and controlled through the provisions of Section 312, and water, gas, or other materials associated with the secondary recovery of oil." S. Rep. No. 92-414 at 76 (1971), *reprinted in*, 1972 Leg. Hist. 2: 1494 (emphasis added). The Senate intended to exempt "water derived in association with oil or gas production" only if the water was "disposed in a well . . . approved by authority of the State in which the well is located." 1972 Leg. Hist. 2:1698.

The House version of the bill further tightened the Senate's already narrow exemption by requiring not only that the water be disposed of in a State-approved well but also that the State make a determination that the well disposal "will not result in the degradation of ground or surface water resources." *Compare* 1972 Leg. Hist. 1:1068, *with id.* 2:1697-98. The House Committee Report emphasized that this exception was to be construed very narrowly:

> It is the intent of Congress that the exclusion from the term "pollutant" relating to the injection of *water*, gas, or other materials into wells applies only . . . to the *properly executed disposal in wells* of brines derived in association with the production of crude oil or natural gas, *with appropriate precautions taken to assure that such injection or disposal does not lead to, or make substantially more likely, the degradation of usable water resources*. For such

> exclusion to be effective, the State is required (1) to approve the well used either to facilitate production or for disposal purposes, and (2) *to make a determination, based on sufficient investigation and evidence, that such degradation has not taken place and has not been or will not be made substantially more likely as a result of such injection or disposal.*

H.R. Rep. No. 92-911 at 131 (1972), *reprinted in*, 1972 Leg. Hist. 1:818 (emphasis added).

The debate on the floor of the House confirms that Congress would not have intended that produced water be exempt from the NPDES requirement except under the specific conditions spelled out in the definition of "pollutant." It also shows that Congress was concerned about the deleterious effects of the produced water itself, not only the materials that may be added to the water in the oil and gas production process. 1972 Leg. Hist. 1:595. On the House floor, Representative Aspin proposed an amendment to strike the exception altogether. *Id.* at 1:589. However, the supporters of the exception led by Representative Harsha successfully argued that water produced in association with oil and gas extraction should not be regulated under the Clean Water Act as long as it was disposed of in a well regulated under existing state schemes applicable to the oil and gas industry. Representative Harsha explained that "*[h]uge volumes of water* are commonly found in the same underground strata as oil and gas and come up with produced oil and gas." *Id.* at 1:595 (emphasis added). He noted the "injection of *brine water* resulting from petroleum operations back into the earth for disposal purposes is itself an important form of pollution control" and argued that it was not appropriate that this form of control would be "displaced by new Federal authority." *Id.* at 1:596 (emphasis added). Representative Harsha also explained that the House Committee had previously considered Representative Aspin's proposal but had instead added an amendment providing additional safeguards that were not present in the Senate bill. He pointed out:

> [The House bill] is much more stringent than S. 2770 – its Senate-passed counterpart on this issue. [It] . . . tightens this provision [in S. 2770] down considerably and will not permit this process until the State makes a finding or determination that such process will not degrade the waters.

*Id.* 1:595.

The Conference Committee largely retained the House language. According to Senator Muskie, the bill's sponsor:

> The language of the House amendment as regards pollutants associated with oil and gas production was clarified to indicate that the process of injection and disposal of materials associated with oil and gas production from wells would be excluded *only* where a State regulatory program existed. The Conferees intend that this provision assure that no injection or disposal occur in such a manner as to present a potential hazard to ground water quality.

1972 Leg. Hist. 1:178 (emphasis added). Thus, the legislative history shows that the exemption for "water derived in association with oil or gas production" was enacted on the premise that it was unnecessary to treat water produced by oil or gas wells as a pollutant under the Clean Water Act *only* in cases where the water is disposed of in a State-approved well pursuant to an adequate State program to protect ground and surface waters. The debate on this issue confirms that Congress clearly did *not* contemplate that "water derived in association with . . . gas production" would be exempt from the Act's definition of "pollutant" when discharged directly to surface waters where it could harm crops, soils, fish and wildlife.

In short, the Ninth Circuit's holding is consistent with the plain language of the Act, the Act's legislative history and the decision of the Fifth Circuit in *Cedar Point Oil*. Fidelity has identified no circuit split on this issue and no other basis that would warrant the issuance of a writ of certiorari.

## II. THIS CASE DOES NOT TURN ON THE OUTCOME IN *MICCOSUKEE*.

In an effort to convince the Court to at least provisionally grant certiorari pending the outcome in *Miccosukee*, Fidelity argues that this case turns upon the issue before the Court in *Miccosukee*: *viz.* whether dams and other types of surface water management activities should be subject to the NPDES requirement of the Clean Water Act. *See* Petition for Certiorari at 29. In *Miccosukee Tribe of Indians v. South Florida Water Management Dist.*, 280 F.3d 1364, 1367-69 (11th Cir. 2002), the Eleventh Circuit held that a public agency that manages a flood control project consisting of a system of levees, canals and water impoundment areas must obtain an NPDES permit when it pumps polluted water from one water impoundment area to another because such pumping constitutes the "addition" of a pollutant "from" a point source. The First and Second Circuits have likewise held that an NPDES permit is required for activities that involve interbasin transfers of surface water. *Catskill Mountains Chapter of Trout Unlimited v. City of New York*, 273 F.2d 481, 492 (2d Cir. 2002) (diversion of water from a reservoir containing pollutants through a tunnel into a creek constituted "addition" of pollutants from a point source); *Dubois v. United States Dep't of Agric.*, 102 F.3d 1273, 1299 (1st Cir. 1996) (pumping of polluted surface water for use in snowmaking and its subsequent discharge into a lake would constitute an "addition" of pollutants from a point source), *cert. denied*, 521 U.S. 1119 (1997). On the other hand, the D.C. Circuit and the Sixth Circuit have held that dams and other surface water management facilities do not require an NPDES permit where they do not "add" pollutants from the "outside world," *i.e.* from outside the "waters of the United States," into navigable waters.[7]

7. The above cases have differences as well as similarities. For example, *Consumers Power* and *Gorsuch* involved exchanges of water from the same water body, while *Catskill Mountains* and *Dubois* involved interbasin transfers. *Dubois* unlike the other three cases involved a discharge resulting from a private commercial activity (snowmaking) rather than more traditional "surface water management."

*Consumers Power Co.*, 862 F.2d at 589; *Gorsuch*, 693 F.2d at 175.

The case *sub judice* is distinguishable from the above cases on at least three important grounds. First, it does not involve a transfer between two bodies of navigable waters. Second, it does not involve "surface water management," but instead involves an industrial process that produces copious amounts of groundwater as a waste product – water that would otherwise remain deep below the earth and never enter the "waters of the United States." Finally, the waste water at issue here is "produced water," *i.e.* "water derived in association with . . . gas production," a waste product which is expressly mentioned in the Act's definition of "pollutant" and which is afforded a unique status under that definition. 33 U.S.C. § 1362(6)(B). These three differences are entirely dispositive of the issues in this case. Thus, regardless of how the Court may in *Miccosukee* resolve the perceived circuit conflict over whether dams and other surface water management activities "add" pollutants to navigable waters, the Court's decision would not detract from the Ninth Circuit's holding that groundwater produced in the CBM extraction process is a "pollutant" under the Clean Water Act.[8]

It is true that the Ninth Circuit cited *Miccosukee*, *Catskill Mountains* and *Dubois* for the proposition that "transporting water from one water body to another [without an NPDES

8. Fidelity's petition repeatedly seizes on the Ninth Circuit's statement that the issue of whether CBM water is a pollutant is "practicably indistinguishable" from the issues considered in *Miccosukee* and other similar cases. App. 15a. But as the Ninth Circuit itself recognized elsewhere in its opinion, the determination of whether Fidelity's waste water is a "pollutant" ultimately turns on the plain language of Act's definition of "pollutant," rather than on case law construing the meaning of the term "addition." Ironically, Fidelity argued below that this case was distinguishable from *Miccosukee* for precisely this reason. *Id.* It is only now that the Court granted certiorari in *Miccosukee* that Fidelity has changed its position to embrace the alleged similarities between the two cases.

permit] *can* violate the [Clean Water Act]." App 14a-15a (emphasis added). But this statement merely responded to Fidelity's extreme position that a discharge of "unaltered water" would *never* require an NPDES permit under *any* circumstances, a proposition that finds *no* support in the case law. *Id.* at 15a (rejecting argument that "discharge of water *cannot* be a pollutant simply because the discharged water is unaltered"). As shown above, the Ninth Circuit was right to reject that argument and hold that a discharge of "unaltered water" without a permit *does* violate the Clean Water Act at least where the water is a waste product of an industrial process, originates from deep below the "waters of the United States," is "derived in association with oil or gas production," and is not injected in a State-approved well. 33 U.S.C. § 1362(6)(B).

Because these important statutory rules were not implicated in the line of cases addressing dams and other surface water management activities, the Court's decision in *Miccosukee* will not address the issue presented by this case. Accordingly, there is no reason for the Court to grant certiorari pending its decision in *Miccosukee* as Fidelity requests. *See* Petition for Certiorari at 29. On the contrary, because there is no authority supporting Fidelity's position on the narrow issue of whether waste water discharged in the CBM extraction process is a "pollutant" under the Clean Water Act, Fidelity's petition should be denied in its entirety.

## III. PRACTICAL CONSIDERATIONS DO NOT SUPPORT ISSUANCE OF A WRIT OF CERTIORARI.

There is no practical necessity for the Court to grant certiorari to decide whether the waste water generated as a result of CBM production should be treated as a "pollutant" under the Clean Water Act. There is remarkable unanimity among federal and state agencies that waste water derived from the production of CBM is a "pollutant" under the Clean Water Act and that its discharge requires an NPDES permit. The EPA requires CBM producers to obtain NPDES permits on Indian reservations, the

only places where it exercises direct Clean Water Act jurisdiction.[9] Likewise, environmental agencies in major CBM producing States such as Colorado and Wyoming currently require NPDES permits for discharges of CBM produced water.[10] Fidelity has itself obtained NPDES permits for all of the discharges at issue in this case. App. 7a n.2. Fidelity does not attempt to make any showing that the NPDES permit requirement has imposed any unreasonable burden on natural gas producers in Montana or in other states. Indeed, Fidelity is currently seeking to expand its Montana operation notwithstanding the NPDES permit requirement.

Fidelity maintains that certiorari should be granted because the Ninth Circuit's decision raises federalism concerns. But it is important to note that the effects of CBM discharges are not confined to the boundaries of individual states. For example, CBM discharges in Wyoming already affect water quality in the downstream Montana reaches of the Tongue River. Fidelity's discharges in Montana similarly affect water quality on the nearby Northern Cheyenne Reservation. The NPDES permit requirement ensures that the water quality standards of neighboring states and tribes are respected when another state decides to allow discharges of CBM water into the "waters of the United States." The Tribe believes that disposal of the massive quantities of waste water produced by this rapidly expanding new industry should conform to the requirements of

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9. *See* 66 Fed. Reg. 46,455 (Sept. 5, 2001) (announcing development of "Best Professional Judgment" determination of effluent limitations for NPDES permitting of CBM wells on Indian lands); 55 Fed. Reg. 40,235, 40,236 (Oct. 2, 1990) (issuing general NPDES permit for CBM wells on Colorado's Southern Ute Reservation).

10. *See* http://deq.state.wy.us/wqd/watershed/91131.pdf (Wyoming general NPDES permit for CBM production); *Swartz v. Beach*, 229 F. Supp. 2d 1239, 1270-72 (D. Wyo. 2002); *Southern Colorado C.U.R.E. v. Evergreen Operating Corp.*, No. 98-WM-1518 (D. Colo. 1999) Recommendation of Magistrate Judge at 23-24; Colorado NPDES Permit Issued to J.M. Huber Corp. (Appellee's Excerpts of Record at 178-80).

the federal Clean Water Act and should not be left solely to the policy choices of individual states.

## CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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